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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES ABERCROMBIE, JR.,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 02A03-0607-CR-290

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-0510-FD-736

April 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF CASE

James Abercrombie, Jr. (“Abercrombie”) appeals his convictions after a bench trial for possession of marijuana as a class D felony and carrying a handgun without a license as a class A misdemeanor.

We affirm.

ISSUE

Whether the trial court erred by admitting a handgun and marijuana discovered during a pat-down search of Abercrombie’s outer clothing.

FACTS

At approximately 8:00 P.M., on October 16, 2006, Officer Christopher Hoffman (“Officer Hoffman”) of the Fort Wayne Police Department was patrolling a high crime area known for significant drug activity, when he noticed a green Monte Carlo parked on Traverse Place. He “observed that the [internal] dome light was on and the vehicle’s external lights were off.” Tr. 13. Officer Hoffman drove past the vehicle, circled the block and approached the vehicle.

As Officer Hoffman approached, the vehicle’s two occupants “immediately jumped out” *Id.* The subject in the driver’s seat, later identified as Abercrombie, looked at Officer Hoffman, “appear[ing] to be very startled” with a “deer in the headlight[s] look.” *Id.* When the men began to walk quickly away from him, Officer Hoffman ordered them to return to his location. As the men approached him, Officer Hoffman saw that they were “continually reaching into their pocket[s].” *Id.* at 15.

Officer Hoffman approached Abercrombie and “immediately smelled a strong odor of burnt marijuana” about Abercrombie’s person. *Id.* Officer Hoffman asked Abercrombie to place his hands on top of a nearby vehicle, and began to pat down his clothing. Despite Officer Hoffman’s repeated instruction that Abercrombie keep his hands on top of the car, Abercrombie repeatedly “brought one of his hands down to the area of his right waistband on his pants.” *Id.* As Officer Hoffman conducted his pat down search of Abercrombie’s clothing, he “felt the outline of a semi-automatic handgun” in Abercrombie’s waistband. *Id.* at 17. Officer Hoffman confiscated the weapon and handcuffed Abercrombie. After Officer Hoffman “verified that [Abercrombie] had never applied nor received a handgun permit,” he arrested Abercrombie for carrying a handgun without a license and waited for an assisting officer. *Id.*

Soon thereafter, Officer Gary Hensler, Jr. (“Officer Hensler”) was dispatched to Traverse Place. At the scene, Officer Hensler “patted [Abercrombie] down in [a] search incident to Officer Hoffman’s arrest.” *Id.* at 7. He found a bag of marijuana in Abercrombie’s right coat pocket and a blunt¹ in the left pocket of Abercrombie’s pants. *Id.* Officer Hensler advised Officer Hoffman about his findings and gave the marijuana to Officer Hoffman. Officer Hoffman completed the investigation, while Officer Hensler guarded the suspects. The officers searched the Monte Carlo prior to having it towed, and found two additional bags of marijuana in the glove compartment. *Id.* at 37.

¹ A blunt is a cigar packed with marijuana. *Perryman v. State*, 830 N.E.2d 1005, 1011 (Ind. Ct. App. 2005).

Abercrombie was charged with one count of possession of marijuana as a class D felony and with carrying a handgun without a license as a class A misdemeanor. On May 10, 2006, the matter was brought to trial before the bench.

In response to defense counsel's preliminary questions at trial, Officer Hoffman testified

Typically, I've made multiple arrests, and due to the fact that people inside vehicles either [sic] using or distributing narcotics, due to the [high crime] area, [and] time of day, I – it just drew my attention. There were no other vehicles on the street with the dome lights on, and . . . I know the area to be a very high crime area, so it just drew my . . . suspicion as to what they were up to.

Id. at 20. Officer Hoffman added that his suspicions were further aroused when he observed Abercrombie's appearance, "his appearing to be startled and the fact that he exited the car upon seeing [that the] squad car was approaching" *Id.* at 22. Officer Hoffman later testified that he asked the two subjects to remove their hands from their pockets due to officer safety concerns. He explained that in his experience as a law enforcement officer, "there's [sic] typically two reasons . . . [for suspects] to reach and bury [their hands in] their pocket or waistband, one being to retrieve a weapon; and two, to dump an object or get rid of contraband." *Id.* at 16.

Abercrombie's counsel objected to the admission of the handgun and marijuana, arguing that they were seized pursuant to an improper investigatory stop. The attorneys argued the question of whether Officer Hoffman had sufficient reasonable suspicion to justify his investigatory stop. Thereafter, the trial court stated,

[I]t seems to me that each one of these things individually is not enough, but I think when you put them together, the cumulative effect of all those

activities – the fact that it’s a high crime area, two guys sitting in a car [at] that time of day with the dome light on and [Officer Hoffman] testifying that . . . he’s seen that happen in dope transactions or dope using, the fact that they exited the vehicle and walked away quickly when [Officer Hoffman] came back and the deer – I’m not sure how much weight to put on the deer in the headlights. That . . . is a factor, too, I guess. All of those factors together, I believe gave [Officer Hoffman] reasonable suspicion that some criminal activity was going on.

Id. at 32-33. The court then admitted the evidence over Abercrombie’s objection. The trial court found Abercrombie guilty of the charged offenses. Abercrombie was sentenced to one and one-half years on the marijuana possession charge, and one year on the handgun charge. The court ordered the sentences served concurrently and suspended Abercrombie’s sentences to active adult probation.

DECISION

Abercrombie argues that the trial court abused its discretion when it admitted the handgun and marijuana over his objection. Specifically, he contends that the evidence was seized pursuant to an improper investigatory stop for which Officer Hoffman lacked reasonable suspicion that Abercrombie was engaged in criminal activity. Therefore, Abercrombie argues, the evidence should have been excluded. We disagree.

Our standard of review of rulings on the admissibility of evidence is the same whether the challenge is made by a pre-trial motion to suppress or by a trial objection. *Castner v. State*, 840 N.E.2d 362, 365 (Ind. Ct. App. 2006). The admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse the trial court’s determination only for an abuse of that discretion. *Saunders v. State*, 848 N.E.2d 1117, 1122 (Ind. Ct. App. 2006). An abuse of discretion occurs when a decision is

clearly against the logic and effect of the facts and circumstances before the trial court. *Id.* We look for substantial evidence of probative value to support the trial court's decision. *Castner*, 840 N.E.2d at 365. We consider the evidence most favorable to the trial court's decision and any uncontradicted evidence to the contrary. *Id.*

Abercrombie contends that Officer Hoffman's investigatory stop does not pass constitutional muster. Under the federal constitution, an officer may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based on specific and articulable facts, the officer has a reasonable suspicion that criminal activity is afoot. *Overstreet v. State*, 724 N.E.2d 661, 663 (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). "Accordingly, limited investigatory stops and seizures on the street involving a brief question or two and a possible frisk for weapons can be justified by mere reasonable suspicion." *Overstreet*, 724 N.E.2d at 663.

Reasonable suspicion exists where the facts known to the officer and the reasonable inferences therefrom would cause an ordinarily prudent person to believe that criminal activity has occurred or is about to occur. *Castner*, 840 N.E.2d at 366. Facts supporting a reasonable suspicion that criminal activity is afoot must satisfy some minimum level of objective justification for the temporary detention of a person to be valid. *Id.* "Law enforcement officers must have more than an inchoate and unparticularized suspicion or hunch, but need not have the level of suspicion necessary for probable cause." *State v. Belcher*, 725 N.E.2d 92, 94 (Ind. Ct. App. 2000).

Where, as here, a defendant challenges the constitutionality of a *Terry* stop, the critical inquiry is often whether law enforcement officers did, in fact, have reasonable

suspicion to initiate the stop. *Id.* In evaluating the legality of a *Terry* stop, we must consider the totality of the circumstances. *Id.* The reasonable suspicion inquiry is fact-sensitive and must be determined on a case-by-case basis. *Id.*

We have previously held that flight from a police officer is sufficient to justify an investigatory stop. *Id.* (citing *Wilson v. State*, 670 N.E.2d 27, 30 (Ind. Ct. App. 1996)). In *Wilson*, police officers were patrolling in a high crime area at 1:00 A.M., when they observed the defendant and another person exchanging an object in a vacant lot. As the officers approached to investigate further, the two men ran and hid between two houses. The police officers exited their squad car, approached the men and called for them to stop. The men fled, and a chase ensued. During the chase, the defendant put a balled-up piece of brown paper into his mouth. When the police caught the defendant, an officer conducted a pat down search of the defendant. During the search, the defendant spit out the object that he had placed into his mouth; officers later identified the contents as rock cocaine.

At trial, the defendant moved to suppress the drugs, but his motion was denied. The defendant was convicted; and on appeal, he challenged the validity of the *Terry* stop. In the past, we have focused on the defendant's flight from law enforcement, and the impact of such flight on the determination of whether sufficient reasonable suspicion existed for an investigatory stop. *Id.*, *Belcher*, 725 N.E.2d at 94. "We observed that flight from a police officer is sufficient to justify an investigatory stop." *Id.* Additionally, we noted as ironic the fact that had the defendant not fled, "it would have enhanced his argument against the presence of reasonable suspicion." *Id.*

Here, Officer Hoffman was patrolling a high drug crime area after dark when he saw Abercrombie sitting with another subject in a vehicle. The vehicle's internal dome light was on, but its exterior lights were off. Given Officer Hoffman's law enforcement training and experience, his familiarity with the area, and the fact that he had previously made multiple arrests under similar circumstances, Abercrombie's conduct indicated the possibility of either the use or sale of narcotics. When Officer Hoffman's squad car circled the block and approached the vehicle in which Abercrombie was sitting, Abercrombie and the other subject immediately jumped out and quickly began walking away. Officer Hoffman also observed that Abercrombie was visibly startled, describing Abercrombie's demeanor as that of "a deer in the headlights" when "they typically look at you and appear to be very startled and don't know what to do." Tr. 15.

On direct examination of Officer Hoffman, the following exchange ensued:

[State]: Did you notice anything unusual on that particular day?

[Ofc. Hoffman]: Yes, I did. . . ., I observed a green Monte Carlo sitting on the side of Traverse Place. I observed that the dome light was on and the vehicle's exterior lights were off, which kind of prompted my suspicion as to what they were doing. I continued on past the vehicle and observed that they were still sitting in their vehicle.

[State]: What did you do as you continued on past the vehicle?

[Ofc. Hoffman]: I then turned around, returned towards the area, [in] which the vehicle was sitting along side of [sic] the road. Prior to even stopping my vehicle, both subjects immediately jumped out of the vehicle upon seeing my squad [car].

[State]: [W]hat led you to believe they did that because they saw your squad car?

[Ofc. Hoffman]: It's just due to the fact that I'd just turned the corner. They jumped out in a hurry. It was obvious that it wasn't a casual movement. . . . They were attempting to get out of the vehicle before I had approached it.

Id. at 13-14.

Officer Hoffman ordered the men to return to his location. As they approached him, both men repeatedly reached into their pockets and into the waistbands of their pants. Officer Hoffman's experience led him to suspect that the men were either retrieving weapons or dumping contraband. *Id.* at 16. Fearing for his safety, he asked the men to remove their hands from their pockets. When he approached Abercrombie, Officer Hoffman could smell a strong odor of marijuana about his person. Officer Hoffman's pat down search of Abercrombie's outer clothing revealed the outline of a weapon. A closer search yielded a handgun, and subsequent searches produced bags of marijuana and a blunt.

When viewed in totality, Abercrombie's hasty exit from the vehicle and his behavior, coupled with the other facts stated above, justified Officer Hoffman's reasonable suspicion that criminal activity might be occurring. Therefore, under the totality of the circumstances, Officer Hoffman executed a lawful *Terry* stop for investigative purposes. We find that the trial court did not abuse its discretion when it admitted the handgun and marijuana into evidence.

Affirmed.

BAKER, C.J., and ROBB, J., concur.